LOS ANGELES BAR BULLETIN

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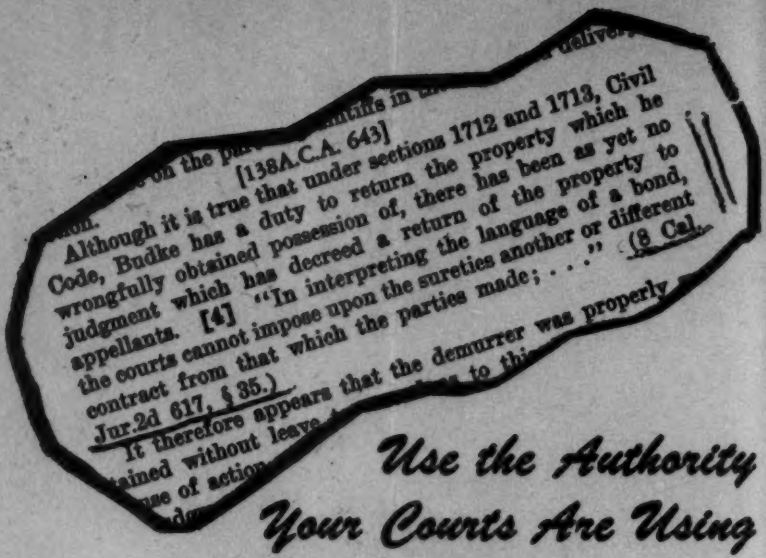

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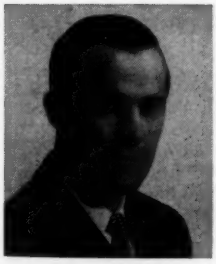
VOL. 31 JUNE, 1956 No. 8

The President's Page

By WILLIAM P. GRAY



William P. Gray

It is always an additional source of pride in our Association to learn of yet another way in which its committee members are quietly and regularly serving the cause of the Administration of Justice; perhaps you have not heard about this one:

Ever since last November, a special committee of the Junior Barristers, under the chairmanship of Martin J. Schnitzer, has had one of its representatives present in the Psychiatric Department of the local Superior Court (Department 54) on each Monday, Wednesday and Friday for the purpose of serving there as counsel for any indigent person requesting such assistance. This arrangement grew out of an awareness by the Court and the professional staff assigned to that Department that such representation was needed in many cases; and inasmuch as the Public Defender was authoritatively ruled unable to assume this responsibility, the Bar Association was asked to help.

Judge J. Howard Ziemann, who now presides in Department

54, and who has encouraged and facilitated the work of the panel, writes that those participating have been of considerable help to the Court, and in his letter he expresses appreciation concerning the high type of professional service that they have rendered.

We join with Judge Ziemann in thanks and congratulations to all members of the panel. They would welcome additional help in continuing this worthwhile program.

Issue Editor—Richard Tuttle

Report of the Committee on Corporations

To the Board of Trustees of the Los Angeles Bar Association:

The report of the Committee on Corporations appointed by President Chantry is submitted herewith. Sections 1 and 2 pertain to the California Securities Law. Section 3 relates to mandatory cumulative voting of directors.

Section 1. In the case of the average small corporation where no public offering is contemplated arrangements of an informal nature take place but legally no negotiations for sale or subscription can be had in advance of a permit from the Commissioner of Corporations. Therefore, a corporation may be forced to proceed without knowing in fact whether anyone will buy its securities. In other cases agreements are made between two or more persons, of a conditional nature, expressly subject to obtaining approval of the Corporation Commissioner. It has been contended that these preliminary activities should not be of doubtful legality. (See discussions in the *State Bar Journal* in the May-June issue of 1951, Vol. XXVI, No. 3, p. 197; May-June issue of 1952, Vol. XXVII, No. 3, p. 190; July-August issue of 1953, Vol. XXVIII, No. 4, p. 259; May-June issue of 1954, Vol. XXIX, No. 3, p. 235; January-February issue of 1955, Vol. XXX, No. 1, p. 33.) It should be added that certain preliminary undertakings of security brokers and underwriting contracts may also be of uncertain legality under the existing law.

A pending bill in the legislature, known as AB 1732, proposes to amend Section 25153 of the Corporations Code so as to extend to incorporated companies the right to take subscriptions for its securities upon the condition that within ninety days after acceptance of the subscription the company would obtain a permit authorizing the issuance of the securities and that no portion of the consideration shall be received unless and until a permit has been granted.

When this bill was considered by the Board of Governors of the State Bar on March 17, 1955 vigorous opposition was made

by the Commissioner of Corporations through Donald A. Pearce, Assistant Commissioner of Corporations. We understand that as a result AB 1732 has not received the support of the State Bar. Later, in a lengthy letter to the Board of Governors dated April 4, 1955, summarizing the Commissioner's viewpoint, Mr. Pearce stated that it is the practice of attorneys in Northern California to obtain offering or negotiating permits so as to remove any doubt as to the legality of pre-permit contracts between underwriter and issuer. Then he added: "However, it is the writer's belief that the Commissioner would seriously consider some type of an amendment to the Corporate Securities Law to allow licensed brokers to enter into preliminary best efforts and underwriting contracts subject to obtaining ultimate approval of the Commissioner of Corporations, if such is deemed necessary, rather than following the practice of getting an offering permit."

At the invitation of the Committee Graham L. Sterling, Chairman of the Corporations Committee of the State Bar, appeared at a meeting and discussed the uncertain legal status of preliminary financing agreements under the present law. He suggested that the Corporate Securities Law should be amended so as to exempt from the permit requirements certain limited types of agreements for the sale or issuance of securities conditioned in each case on the agreement providing that no part of the purchase price of the securities will be paid until a permit for their issuance has been obtained. Thereafter, upon the request of the Committee Mr. Sterling prepared a draft of a new section 25155 to be added to Article 2, Chapter 2 of Division I of Title 4 of the Corporations Code to read as follows:

> "§25155. *Certain Agreements for the Issuance or Sale of Securities Exempted: Conditions of Exemption.* No provision of the Corporate Securities Law prohibits a company from making an agreement to sell or issue any security of its own issue if:
>
> (a) each of the proposed purchasers who is a party to the agreement is a broker holding a broker's certificate issued by the commissioner or a broker-dealer registered as such under the Securities Exchange Act of 1934; *or*
>
> (b) all of the proposed purchasers are parties to the agreement and each such party is a bank, savings institution, trust company, insurance company, investment trust, pension fund or pension trust, employees'

profit-sharing trust, financial institution or a corporation engaged, as a substantial part of its business or operations, in investing funds in securities, and each such party undertakes in the agreement, in substance, that such party will purchase the security for investment and not for the purpose of making any public distribution thereof; *or*

(c) all of the proposed purchasers are parties to the agreement and the total number of persons solicited to purchase the security proposed to be issued or sold (including those who are parties to the agreement) shall not exceed twenty-five, and each such party shall undertake in the agreement, in substance, that such party will purchase the security for investment and not for the purpose of making any public distribution thereof; *and*

(d) if the agreement states, in substance, that none of the proposed purchasers of the security is obligated to pay all or any portion of the purchase price of the security unless and until the company proposing to issue or sell the security has obtained from the commissioner a permit authorizing the issuance or sale of the security in accordance with the agreement.

Nothing in this section permits the payment, to or for the account of a company proposing to issue or sell any security of its own issue, of the purchase price, or any portion thereof, unless and until such company has obtained from the commissioner a permit authorizing the issue or sale of such security."

A copy of this proposed statute was sent to the Commissioner of Corporations and he was invited to express his viewpoint before the Committee at its meeting on January 19, 1956. Assistant Commissioner of Corporations Pearce and Mr. Sterling attended this meeting and discussed the problem involved and the provisions of the proposed new section 25155. Mr. Pearce conceded that there was probably no objection to exempting agreements of licensed brokers (Par. (a)) and of corporate and institutional investors (Par. (b)). He objected, however, to the provisions exempting agreements of individual purchasers even though the number solicited shall not exceed twenty-five (Par. (c)).

Mr. Pearce (who is also Chief of the Fraud Bureau of the Division of Corporations) contended that exempting from the permit requirements agreements of even a small number of individuals would make prevention of fraud more difficult. Several members raised the point that under the proposed statute the

acceptance of money would be the important act of fraud and would constitute a violation of the law which would allow the Commissioner to arrest the violator immediately. Mr. Pearce's reply was that it was easier to arrest for offering to sell securities without a permit than for wrongfully accepting part of the purchase price of the securities under the proposed statute.

It is the conclusion of the Committee that balancing legitimate business interests against greater facility in the prevention of fraud as contended the proposed statute is reasonable and should be adopted. Therefore, the Committee recommends that a bill be introduced into the legislature to add to Article 2, Chapter 2 of Division I of Title 4 of the Corporations Code a new Section 25155 reading as above set forth.

Section 2. The Committee elected to commence a study of a proposed Uniform Securities Act which has been drafted under the direction of Professor Louis Loss of Harvard Law School and Submitted to an Advisory Committee consisting of representatives of the National Conference of Commissioners on Uniform State Laws, the National Association of Securities Administrators, the Securities Exchange Commission, the American Bar Association, the Investment Bankers Association, and the National Association of Securities Dealers, Inc., together with six prominent "blue sky" lawyers, one of whom is Harry L. Dunn of Los Angeles. Professor Loss kindly furnished sufficient copies of the second draft for the use of members of the Committee. At one meeting the general provisions of the proposed law were discussed by Mr. Dunn and at another meeting the viewpoint of the Corporation Commissioner's office was presented by Honorable Herbert A. Smith, Assistant Commissioner of Corporations. This model act follows a four-part plan: (I) Fraud; (II) Broker-Dealer Registration; (III) Securities Registration; and (IV) General Provisions. As stated by the draftsman, the object is to prepare an acceptable state statute coordinated with federal legislation but containing "sufficient teeth to deal with promotional issuers and the shoddier aspects of the world of finance, without needlessly impeding legitimate financing or subjecting honest issuers and dealers to the hazards of civil liabilities for unintentional and non-negligent violations of a technical nature." No useful purpose would be served by summarizing and discussing at this time the features of this proposed statute since a final draft

will be prepared during 1956 and no doubt will be the subject of considerable discussion in various legal publications. It is enough to say here that the draft discloses a general plan to regulate the financing of business and the sale of securities by established principles set forth in the statute as contrasted with a very broad delegation of discretionary power to administrators as illustrated by the California Corporate Securities Act, which is known generally as the "permit system." The point to be emphasized is that this proposed uniform law is worthy of continued study by the Association's Committee on Corporations to the end that it will ultimately be in a position to determine whether to recommend for California the model statute (which will in the near future be presented for adoption in this state) or whether to recommend that any particular portion of such a statute should be made use of, or whether to recommend that any effort to change our existing laws be rejected entirely. Therefore, we suggest that this Committee be instructed to continue its study of the proposed Uniform Securities Act.

Section 3. Upon the request of its Board member the Committee investigated the desirability of adding a section to the Corporations Code permitting the elimination of cumulative voting for directors by an appropriate provision in the Articles or in an amendment to the Articles, and also the desirability of a section enabling a California corporation to have a staggered three-year board of directors, with a third only being up for election each year.

California is one of twenty states which have mandatory cumulative voting for directors, whereas seventeen states have statutory provisions making cumulative voting for directors permissive. In California every shareholder entitled to vote at any election for directors (of a profit corporation) may cumulate his votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which his shares are entitled or distribute his votes on the same principle among as many candidates as he thinks fit. (Corp. Code Sec. 2235.) Protection against destruction of this right through removal of directors by majority action is contained in another section providing that unless the entire board is removed an individual director cannot be removed if the number of shares voted against the resolution for his removal exceeds the quotient arrived at when

the total number of outstanding shares entitled to vote is divided by one plus the authorized number of directors. (Corp. Code Sec. 810.)

Recent efforts to unseat corporate managements by the use of cumulative voting have brought this device into the limelight and its merits and demerits have been argued in numerous articles and have been debated in the House of Delegates of the American Bar Association ("Should Cumulative Voting for Directors Be Mandatory?—A Debate"—Vol. XI No. 1 (November 1955) of the Section of Corporation, Banking and Business Law of the American Bar Association.) In stating the arguments for and against mandatory cumulative voting we cannot improve upon the following able summary by Whitney Campbell of the Chicago Bar Association.

The principal arguments of the proponents of cumulative voting for directors are:

(a) that a board of directors, whatever its size, should be as representative of all the shareholders as possible;

(b) that cumulative voting is the only device which gives some assurance of minority representation on the board of directors;

(c) that while the majority will continue to control under cumulative voting, it is desirable for the entire board to hear the views and opinions of the minority on all matters considered by the board; and

(d) that the presence of one or more minority representatives on the board of directors will serve as a check on any tendency of those who compose or control the majority to operate the corporation for their own benefit.

Those who oppose cumulative voting present the following principal arguments:

(a) that a board of directors, to be effective, must be a team chosen by the majority to carry forward the operations of the corporation;

(b) that minority representation too often produces a contentious, unwieldy and ineffective coalition of directors; and;

(c) that cumulative voting operates as a wedge and a tool for the benefit of the shareholder who wishes to harass the management, after the fashion of the "strike" suit shareholder.

By definition the "strike" suit shareholder is one who generally operates in his own interest and not in the interest of all the shareholders. The argument, however,

> that the "strike" suit type of shareholder is aided in his malefactions by cumulative voting disregards the fact that the "strike" suit shareholder usually has only a token share ownership while the achievement of board representation through cumulative voting requires the concerted action of shareholders having an investment in the corporation proportionate to the number of directors to be elected. ("The Origin and Growth of Cumulative Voting for Directors" Vol. X No. 3 (April 1955) of the Section of Corporation, Banking and Business Law of the American Bar Association.)

The question has been raised as to whether the permissive type of statute gives a shareholder anything more than an illusion of a right since the existence of the cumulative right is dependent upon its affirmative creation in the charter of the corporation but it can usually be removed from the charter by amendment, and thus the majority can always promptly eliminate this cumulative voting right of the minority. Moreover, as the Delaware Chancellor has warned:

> "Many who are numbered among the majority today may find themselves among the minority tomorrow. . . . When, therefore, a majority of the shares outstanding vote to take away the right of one share to vote with cumulative strength, those who compose that majority take away from themselves as well as from those who compose the then minority a right which is common to all. The deprivation of the right is not partial in its operations. It is visited on all alike. Now it may be unwise as a matter of policy to allow those in the temporary majority to destroy this right which is common to all." (Maddock v. Vorclone Corporation, 17 Del. Ch. 39, 147 Atl. 255 (1929).)

The conclusion of the Committee is that California should retain its statute providing for mandatory cumulative voting for directors and also its statute providing for the election of directors for the same term of office.

February 8, 1956.

Respectfully submitted,

John J. Beck	Julian Isen
Henry G. Bodkin, Jr.	William P. Martin
Phil H. Curry	Peery Price
Hugh W. Darling *Board Member*	William G Robertson
Gerold C. Dunn	Gerald P. Rosen
S/Robert H. Edwards *Chairman*	Richard W. Sprague
Peter E. Giannini	Glendon L. Tremaine *Secretary*

Tax Reminder

By FRANCIS N. O'NEILL

Attorneys with clients leasing property from governmental agencies should read the recent decision in *DeLuz Homes, Inc. v. County of San Diego,* 45 C. 2d 546. General practitioners might well read the decision as it declares the principles governing valuation of leaseholds for all purposes.

This decision declares the following: (1) net income is the best indication of the value of a lease; (2) net income is determined by subtracting *actual* expenses from *actual* income; (3) *however, rent paid to the lessor is not an expense of the lease.* It is the "purchase price" of the lease and therefore not considered in determining the net income.

Few will disagree with the first two principles. The third, however, requires re-examination of previous concepts of valuation, especially as *Blinn Lumber Co. v. County of Los Angeles,* 216 Cal. 468 and 474, is expressly repudiated. Under this latest decision it is now immaterial whether the tenant pays an excessive, substantial, or inadequate rent for the use of property. The value of the leasehold is the same in any case. Formerly, under the *Blinn Case* rule, the difference between the fair rental value and the agreed rent, when capitalized over the remaining term of the lease, represented the value of the lease. Lessees of government facilities, under this former concept, paid little taxes when substantial rents were paid to the government; conversely, substantial taxes were paid when the rent was nominal. Under the new *DeLuz Case* rule, all lessees will pay substantial taxes without regard to the amount of rent required to be paid the government

Whether preparing new leases or renegotiating old, consideration should be given to adjustments in the rental provisions to correct this situation. It is suggested that a provision permitting offset of taxes paid against rent provided may in part alleviate the situation.

Because of its declared general application, not being restricted to taxation alone, general practitioners should consider its possible effect in the event of condemnation, damage, or destruction of property, inheritance tax claims and similar situations which might affect the rights of clients.

Report of the Federal Courts Criminal Indigent Defense Committee for the Period from April, 1955 through March, 1956

This Committee conducts one of the largest criminal law practices in the country. Another and equally important characteristic of its practice is that it is a *free* service. Until such time as a public defender system is instituted in the Federal Courts*, this Committee no doubt will continue its flourishing practice. United States District Court Judge James M. Carter, speaking on behalf of the entire Federal District Court for Southern California, has recently made the following generous comments:

> "The work of your Committee has been carried on efficiently and expeditiously; the lawyers assigned were uniformly in attendance and diligently represented the clients they were assigned to defend. In the cases that went to trial, the defenses were more than adequate.
>
> * * * * * *
>
> "It is indicative of the awareness and progressive thinking of the organized Bar of this city, that it has organized this Committee and carried on this worthwhile work. Until such time as a Public Defense system is set up by statute for the Federal courts, it will of course be necessary to call upon the assistance of members of the Bar."

The full report of the Committee which has just completed its year of service to the Board of Trustees follows.

NATURE OF COMMITTEE'S WORK

Although it may appear presumptuous, a brief statement as to the work performed by the committee itself is included at this point because of the rather widespread misunderstanding that apparently exists as to the nature of the work expected of any member of the committee. The primary responsibility of the committee

*For a recent comment on the wisdom of such a change, see: *The Totalitarian Aspects of the Public Defender System* by Judge Edward J. Dimock—American Bar Association Journal, March, 1956, Volume 42, Number 3, Page 219.

is to provide counsel for those persons accused and arraigned in the local Federal Courts on a charge of having committed some Federal offense. The committee members must therefore provide sufficient lawyers for each criminal calendar to handle the number of cases involving defendants who have not the means to engage private, paid counsel. The committee members themselves are not obligated to actually serve as defense counsel. A committee member may, if he elects to, participate in the actual role as defense counsel in addition to his duties of recruiting sufficient defense counsel. The criminal calendar is called each Monday in each week during the calendar year with very few exceptions. The case load will vary greatly from Monday to Monday. Since most of the defendants requiring free defense counsel are being held in custody, it is particularly important to provide defense counsel at the earliest opportunity when the defendant is arraigned. The prevailing practice has been for a committee member to take the assignment of recruiting defense counsel for one calendar month. Such committee member is provided a list of names of possible defense counsel from which selections of at least one senior attorney (i.e., normally one who has practiced at least five years) and two or more junior attorneys are made. Each committee member is provided with instruction sheets for distribution to the defense counsel so selected. The committee also provides each defense counsel with a form of report to be returned at the conclusion of his service showing the number of cases he handled and providing other important statistical data. Samples of the instruction form and report form used in the past year are appended to this report. The committee member during the month of his assignment also acts as a liaison between the active defense counsel and the criminal judge handling the criminal calendar concerning any unusual problems which may arise. The committee member also is responsible for following up on the filing of all reports.

Unlike other Bar Association committees, there is comparatively little need for continuous committee meetings. Generally speaking, an organizational meeting is held at the beginning of the committee's year and another meeting at about the halfway point in that year.

STATISTICAL SUMMARY OF COMMITTEE'S WORK

The statistics furnished below as to the work performed during the past year disclose the volume and the diversity of the criminal

law practice which is operated by the committee as one of the most needed public services rendered by the members of the Bar in this city. These statistics have been compiled from the reports turned in to the committee by the lawyers who acted as defense counsel.

184 panel members appeared in the Federal Court to represent indigent defendants
304 cases in which the court has appointed panel members to represent indigent defendants
159 cases in which a plea of guilty has been entered*
73 cases in which a plea of not guilty has been entered*
7 cases in which a dismissal of all counts has been obtained*
81 number of counts dismissed, where the counts dismissed were less than all counts charged*
23 number of trials*
55 number of days spent in trials*

Results of trials

11 verdicts of guilty*
6 verdicts of not guilty*
3 hung jury*
1 judgment of acquittal*

376 total number of appearances made by panel members excluding trials*
81 number of probationary sentences obtained*
2381 hours spent by panel members representing indigent defendants (exclusive of trials).

SIZE OF COMMITTEE

To avoid undue burdens on any individual committee member and to provide flexibility in assignments, it is suggested that the size of the committee should include twenty-five members, including the Chairman and exclusive of any board member. It is also suggested that, before any assignment of any member of the Association is made to this committee, such assignment should be discussed briefly in advance with the proposed assignee and that that assignee's ready acceptance and willingness to work on the committee should be first received.

*These figures are based on actual figures taken from reports turned in to the committee. Since only 53% of the lawyers reported, they should be increased by approximately 47% to get a complete picture of the work performed in these particular categories.

NEED FOR ADDITIONAL LAWYERS

The existing lists of lawyers from which selections are made for senior and junior defense counsel tend to bring about repeated demands upon the same attorneys. Wider publicity as to the work of the committee is needed in order to enlist new names of attorneys who can serve, particularly as senior defense counsel. Newly admitted members of the Bar and, perhaps more importantly, experienced and seasoned members should be urged to serve as defense counsel. It is suggested particularly that the larger law firms in this city should be asked to make a determined effort to interest their personnel to participate in this work. A letter from the President of the Association to a selected list of such larger law firms requesting such participation might be an effective method of securing the names of new defense counsel.

In place of the long typewritten lists of lawyers who have served in the past and who might serve in the future which have been used by the committee in recent years, it is suggested that a new system of individual filing cards for such attorneys should be instituted. It is further suggested that these cards should be maintained at the offices of the Bar Association and that that office provide each monthly committee chairman with a list of lawyers taken from the cards who would be possible defense counsel; that current reports as to the names of the attorneys who did serve should then be entered on such filing cards and thus be kept up to date in a workable fashion. The present long form lists are cumbersome and unworkable and it would facilitate the work of the committee to immediately abandon them in preference to a filing card system of names.

In the interest of recruiting new defense counsel, it is also suggested that approaches should be made to the *Los Angeles Daily Journal* and other periodicals that are used frequently by lawyers with a request that they run repeated appeals for the assistance of the Bar in this city and in the county. More effort should be made to use the services of regional and neighboring bar associations to provide defense counsel.

APPROPRIATION OF FUNDS

In order to meet the needs which arise for long distance telephoning and other out-of-pocket expenses that defense counsel

must experience now and then, particularly the newly admitted members of the Bar who are serving in this capacity and who can ill afford to spend their own money, a small appropriation of $200 should be set aside for the committee so as to reimburse attorneys for such legitimate out-of-pocket expenses.

RECOGNITION OF SERVICE

The committee urges that a letter of acknowledgment should be sent to each member of the Bar who gave his services as defense counsel. This letter should come from the President of the Association. It would accomplish two purposes:

1. The lawyer receiving such a letter would know that his contribution had not gone unnoticed.

2. The lawyer receiving such a letter could be asked to indicate on an enclosed stamped card if he was willing to serve again and, if so, his preferred time. The return of these cards would supply a substantial number of names of lawyers for future use in this work.

SUGGESTIONS FOR SUCCESSOR COMMITTEE

This committee is transmitting to its successor for the coming year a number of operating suggestions for consideration. Since such ideas may or may not be acted upon, it was deemed expedient to omit them from this report.

Respectfully submitted,
S/ G. William Shea
G. William Shea
Chairman

"LAW AND MOTION" - AN INTERVIEW WITH JUDGES DAVID AND IRWIN

EDITOR'S NOTE: *In the opinion of the two judges currently presiding in the law and motion departments of the Los Angeles County Superior Court, the time of both court and counsel is often wasted by the bringing of needless or useless demurrers and motions and by insufficient knowledge of the procedures of the law and motion departments. The comments which follow are taken from remarks made by Judge Leon T. David (currently presiding in Department 26) and Judge Aubrey N. Irwin (currently presiding in Department 35) in an interview with a member of the Bulletin Committee. In addition to devoting an afternoon to the interview, Judges David and Irwin have read, revised and approved the contents of this article. The Committee gratefully acknowledges their cooperation.*

PREPARATION FOR A LAW AND MOTION HEARING

In the words of Judge David, "Parties cannot get better law out of the law and motion department than their attorneys put into it." While the diligence of counsel in research and analysis is always an important factor in any legal proceeding, it is especially important in the law and motion department. The limited time available and the volume of work done by the department limit the amount of independent research that can be done.

The lawyer who copies a list of case titles from the digest into his memorandum without analysis or discrimination is hardly more helpful than one who simply cites "Section 430 C.C.P." (Consult Proverbs 25:11.)

Preparation by the court. Each year the two law and motion departments hear in excess of eight thousand matters, each department generally having from fifteen to twenty matters on its calendar on a given morning. In preparation for the morning's calendar Judges David and Irwin examine in advance the problem presented by each calendar matter. Usually this work is done the preceding afternoon, although on occasion it may be done earlier. The judge has before him the court's file in the litigation, including the moving papers and supporting points and authorities and affidavits of the party presenting the particular question to the court. Opposing counsel, however, often do not file their points and authorities until the time of the hearing. By this time the judges have

grasped the case presented by the moving party and may also have spotted the arguments that adverse counsel will make. Failure to present opposing points and authorities unduly extends oral presentation and frequently requires submission. (Consult Proverbs 18:17.) If, however, opposing counsel file their points and authorities in the law and motion department by noon of the preceding day, they will be giving the court an advance opportunity to examine and understand the matters in issue more precisely. Many of the law and motion matters are decided from the bench when the issues are clearly defined. Therefore, if counsel desire to make a particular point it should be made by the time of the hearing. In the event opposing counsel does not file his memoranda until the time of hearing, and the moving party desires an opportunity to reply, the court may grant it, but only if the matter warrants such treatment.

As Judge Irwin points out, "Success in the law and motion department is directly related to the amount of counsel's research." The judges conscientiously try to become as familiar as possible with the issues presented in each case but the time available to them for research is necessarily limited. Because of the pressure of business, the law and motion department generally must act on the basis of cases cited to it by counsel, with only limited research by the court. It stands to reason that the more diligent counsel are in preparing and presenting their authorities *prior* to the hearing, the better off their clients will be. But unless there is a *real* issue of law to be presented by general demurrer, or unless counsel cannot *really* plead unless some uncertainty prevents, a demurrer should not be made.

Preparation by counsel—The Memorandum of Points and Au-

thorities. In preparing the memorandum of points and authorities the following should be borne in mind:

1. The *precise* question or questions to be decided and counsel's *precise* position supported by authority. For example, in demurring to a complaint it is not sufficent to cite as authority section 430 of the *Code of Civil Procedure.* The particular reason why the complaint in question is demurrable should be set forth accompanied by authority on the point.

2. Counsel should be familiar with recent amendments to the Codes. In illustration of this, Judges David and Irwin point to the fact that in 1955 Section 395 of the *Code of Civil Procedure* was amended to provide that in an action for divorce the county in which plaintiff has been a resident for three months preceding the start of the action is the proper county for trail.[1] Nevertheless despite the enactment of this legislation many motions for change of venue are presented on the ground that the action should have been brought in the county of defendant's residence. Familiarity with the amendment would have saved time of both attorneys and of the court.

3. In citing cases counsel should be careful to give citations to the California and California Appellate Reports. Citations to the Pacific Reporter alone are not acceptable inasmuch as the law and motion judges do not have the Pacific Reporter readily available.

Likewise, in citing cases the beginning page of each case should also be cited; for example, "200 Cal. 326 at 331," not merely "200 Cal. at 331."

Use of Affidavits. If testimony is to be presented it should be by way of affidavits, wherever possible. (If counsel anticipate requesting the court for permission to present short oral testimony or cross-examination and desire the presence of a reporter, arrangements should be made in advance to have the reporter present. If it appears that extended oral testimony will be necessary the court will transfer the matter to Department 1 for assignment.)

A surprisingly large number of attorneys fail to prepare proper affidavits in support of their motions. In those matters where an affidavit may be used (*Code of Civil Procedure,* section 2009), it is the equivalent of testimony received on the witness stand (*Code of Civil Procedure,* section 2002). Because this is so, it must not

[1]See also section 397, subsection 5, of the *Code of Civil Procedure.*

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contain hearsay matter or conclusions of the witness, nor should it contain allegations on information or belief. Affidavits based on information and belief are merely hearsay and will be rejected. (*Kellett v. Kellett,* 2 Cal. 2d 45, 48.) Likewise, many attorneys attempt to include argument in affidavits prepared by them. All too often what is presented in the guise of an affidavit turns out to be merely points and authorities subscribed and sworn to by an attorney. Affidavits to be used in support of motions for summary judgment should not only meet the above requirements but must also state and affirmatively show in the language of *Code of Civil Procedure* section 437c "that affiant, if sworn as a witness, can testify competently" to the matters set forth in the affidavit.

THE HEARING

The opportunity for formal oral argument is limited at a law and motion hearing. Rather, counsel should be prepared to argue specific points which are likely to be raised and to answer questions which the court may ask. In cases involving a long history of prior motions and proceedings, the points and authorities should already have summarized what has gone before; and counsel should be prepared to answer questions on this aspect of the case. Often the court in its preparation is tentatively satisfied with the moving party's presentation of the case and in this event will ask the opposing party to give reasons why the relief sought should not be granted.

PARTICULAR MATTERS

Demurrers. Leave to amend on the sustaining of a demurrer will always be granted by the court unless it is obvious from the face of the complaint (and considering previous complaints) that no amendment can be made which will state a cause of action (Jud. Council Rule 2e). This is so, even if counsel does not desire to amend and requests that the demurrer be sustained without leave to amend. If counsel wishes to stand on his complaint he may do so by failing to amend within the time prescribed by the order granting leave to amend.

Particularly in domestic relations matters, special demurrers are often made on the ground that another action is pending. Judge Irwin feels that such demurrers should not be entertained unless the pendency of the other action appears on the face of the complaint. He will not take judicial notice of the pendency of the other action. A motion to stay the later proceeding is the proper

procedure to use in this situation. (*Code of Civil Procedure* Secs. 433 and 579.)

Special demurrers to answers accomplish very little and are not looked on with favor inasmuch as any newly alleged matter in an answer is deemed denied in any event.

Motions to Strike. Judge David feels that approximately eighty per cent of the motions to strike for uncertainty which are filed in his court are themselves frivolous. Nevertheless, many lawyers have fallen into the general practice of filing motions to strike for uncertainty at the same time as demurrers for the same purpose are filed. Motions to strike are appropriately directed: (1) to eliminate from a pleading surplusage or redundant matter not properly touched by a demurrer and (2) to amend or strike a pleading which seeks to reallege the same matter as to which a demurrer has been previously sustained. Motions to strike should not be used as substitutes for demurrers. A motion to strike an entire pleading, if granted, is a final judgment. (*Atherley v. MacDonald,* 135 Cal. App. 2d 383, 385). Granting of a motion to strike portions of a pleading is discretionary (*Clements v. Bechtel,* 43 Cal. 2d 227, 242). The court will not entertain a motion to strike unless it complies with the provisions of Rule 3c of the Rules for the Superior Court Adopted by the Judicial Council. This rule provides that a notice of motion to strike shall *quote in full* the portion to be stricken except where it is directed to an entire paragraph, cause of action, count, defense or counterclaim. Motions not complying with this rule may be treated as sham.

Verification of Pleadings. Too often the court is presented with a series of amended pleadings, each verified, stating diametrically opposing facts. As pointed out in *Williamson v. Clapper,* 88 Cal. App. 645, 647-48, the requirement of truth in sworn statements is still present. This problem is especially presented by blanket denials to entire paragraphs of a complaint. Merely because section 437 of the *Code of Civil Procedure* authorizes denials with respect to entire paragraphs, it is still not proper to deny allegations known to be true.

Likewise, even though a complaint is not verified, and comes to the court under the signature of an attorney, the *facts* must be stated, not a fictional account framed on the basis of a case without reference to ultimate facts. While inconsistent theories can be pleaded, inconsistent counts with inconsistent facts cannot be

pleaded positively, since some or all must be sham. (C.C.P. 426 (2)). While information can be inconsistent, belief as to the truth cannot be.

Motions for Summary Judgment. In *Pianka v. State of California,* 48 Adv. Cal. Rep. 206, the Supreme Court has recently indicated that the summary judgment procedure, in light of the newly broadened scope of motion for summary judgment, should be used in place of the so-called "speaking motions" formerly used.

Motions for Withdrawal of Counsel. Section 284, subdivision 2 of the *Code of Civil Procedure* requires that an attorney moving to withdraw must give notice of the motion to his client. In this connection, if the client in question is a corporation Judges David and Irwin require that the notice be addressed to an individual who thereafter will be capable of receiving service of process in the action. Proof of the name of the individual to whom the notice was addressed must be given. The court looks with disfavor on motions to withdraw made on the eve of trial and occasioned by fee disputes between client and lawyer and has refused to grant such motions.

Cost Bills. The law and motion departments will hear motions to tax costs if the objection is that the item of cost claimed is one not allowed by law. If, however, the motion to tax is made on the ground that the cost in question was not a necessary expense incurred in the trial of the action, Judge David feels that, not having been at the trial, the law and motion department cannot properly pass on the motion. In this case, or if the case involves several parties, only some of whom prevailed against the other, unless the attorneys can stipulate to a result the matter will be transferred back to the trial judge for a decision. In the situation where a plaintiff has prevailed over one defendant but lost to a second defendant neither Judge Irwin nor Judge David will allow the plaintiff to claim as costs from the defendant over whom he prevailed the amount paid as costs by the plaintiff to the second defendant.

Failure to Appear and Continuance. Because the judges work on the files on the afternoon of the day preceding the hearing, attorneys desiring a continuance of matters on the law and motion calendar should request it prior to noon of the preceding day. Attorneys failing to request continuance by that time must appear at the time set for hearing and present reasons why a continuance should be granted.

If neither counsel appears at a hearing most matters will automatically be taken off calendar, although this is not an arbitrary rule. (See Jud. Council Rule 2d.) In the case of special demurrers under section 426b of the *Code of Civil Procedure* (pleading acts of cruelty in divorce actions), the matter ordinarily will go off calendar upon a failure to appear unless it has been agreed to submit the matter for a ruling.

Rules for the Superior Court Adopted by the Judicial Council. The existence of these rules often comes as a surprise to counsel. Attention is especially called to Rules 2, 3 and 4 dealing with the presentation of law and motion matters.

CONCLUSION

Careful attention to the rules of court, cooperation in notifying the court of requested continuances, thorough research, and the realization that many motions and demurrers are better not made will result in more efficient service to the client and leave more time for consideration of all meritorious points presented for decision.

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of May and June, 1931, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

By Executive Order of President **Hoover,** the opening of individual Federal income tax returns to the inspection of officials of states which have income tax laws was authorized.

* * *

Setting a round the world record, **Wiley Post,** Oklahoma City air pilot and **Harold Gatty** of Los Angeles, navigator, flew in their plane, **Winnie Mae,** from Roosevelt Field on June 23rd and went 15,474 miles around the world in 8 days, 16 hours, total flying time, 4 days, 10 hours.

* * *

By a vote of 58 to 14 the Tennessee House of Representatives voiced its approval of a statute prohibiting the teaching of the theory of evolution in schools by rejecting a bill to repeal the law.

* * *

President **Hoover** has proposed a moratorium for one year of all payments on intergovernmental debts, reparations and relief debts, both principal and interest, owed by important world creditor powers arising from the World War, but not obligations of governments held by private parties. The announcement boosted stock prices all over the world. France alone balked at including unconditional or non-postponable reparations in the moratorium.

* * *

Constitutionality of the Indiana State chain store tax law, imposing a graduated scale of license fees measured by the number of chain stores operated within the State, was upheld by the U.S. Supreme Court in a five-to-four decision.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

During the last year The **Chicago** Bar Association Committee on Inquiry has instituted a new system of interviewing laymen who come to that association with complaints against lawyers. Previously, the procedure was for the complainant to be interviewed by a member of the association staff, who usually could do no more than suggest that the complaint be reduced to writing for consideration by the Committee. Because many complainants were confused, inarticulate — frequently illiterate — this procedure was found to discourage some substantial complaints.

"We are meeting this problem now," says the committee in its latest report, "by having a member of the Committee at the headquarters of the Association one afternoon each week. The task has been rotated among experienced members of the committee. While the interviewing member does not undertake to dispose of the complaint he is able, in a large number of cases, to bring the complainant to a better understanding of his own problem and tactfully to discourage the filing of charges which are obviously unfounded."

"Where there is substance to the complaint, the interviewing member is able to bring out the essential facts and either suggest a written statement by the complainant or prepare a brief memorandum at the interview."

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Five attaches of the Cuyahoga County **(Ohio)** Common Pleas, Municipal and Probate Courts were honored at the 10th Annual Public Servants Testimonial Luncheon of the Cuyahoga County Bar Association.

Los Angeles County Law Library
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